No. 92-2049

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

FLOJO TRADING CORPORATION,

Petitioner,

v.

JANE H. BROWNING, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Court of Appeals District Of Texas At Dallas

RESPONDENTS' BRIEF IN OPPOSITION

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NationsBank Corporation (parent)

NationsBank, Texas, Corporation (parent)

NationsBank, Texas Bancorporation, Inc. (parent)

NationsBank Community Development Corp. (subsidiary)

NationsBank Housing Fund Development Corp. (subsidiary)

HECI Exploration Company, Inc. and Sterling Pipeline Company have no parent or subsidiary companies. NationsBank Corporation has numerous subsidiaries in other states.

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No. 92-2049

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FLOJO TRADING CORPORATION,

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v.

JANE H. BROWNING, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Jane H. Browning, et al.,[1] (the "Brownings") respectfully request that this Court deny the Petition for Writ of Certiorari by Flojo Trading Corporation ("Flojo"), seeking review of the judgment of the

[1] The Respondents are Jane H. Browning, Individually, as Co-Independent Executrix and as Co-Trustee of the Estate of William W. Browning, Jr.; Michael G. Starnes, Individually, as Co-Independent Executor and as Co-Trustee of the Estate of William W. Browning, Jr., as Co-Trustee of the Browning Children's Trusts, and as Special Trustee; Catherine Agnes Land Starnes; Kathryn Louise Browning Cook; Averille Adams Browning Dawson; William Webb Browning, III; Winifred Fallon Browning Vaughn; Robert Holland Browning; and NationsBank of Texas, N.A., f/k/a NCNB Texas National Bank, Successor to FDIC, as Receiver for First RepublicBank Dallas, N.A., Successor to InterFirst Bank Dallas, N.A., Individually and as Co-Trustee of the Estate of William W. Browning, Jr., Deceased.

Texas Court of Appeals for the Fifth Court of Appeals District in Dallas. That court's opinion in this case is reported at 840 S.W.2d 14.

JURISDICTION

The Court should decline to accept jurisdiction to review the judgment of the Texas court of appeals because Flojo did not timely and properly preserve in the courts below the questions it seeks to present here. In addition, there are independent and adequate state grounds upon which the lower court's judgment is based. *See Board of Supervisors v. Allman*, 423 U.S. 940, 96 S.Ct. 300, 46 L.Ed.2d 272 (1975). These matters will be discussed more fully under Reasons for Denying the Writ, *infra*.

STATEMENT OF THE CASE

I. Introduction.

Flojo's petition is a companion to the petition filed by Pat S. Holloway ("Holloway") and Robbie Holloway ("Robbie") in Cause No. 92-2048, *Pat S. Holloway and Robbie Holloway v. Jane H. Browning, et al.* These companion petitions are the culmination of 14 years of litigation between Holloway, sometimes joined by Robbie and Flojo, and the Brownings. Over 15 separate but interrelated proceedings (original lawsuits or original proceedings) have been filed, which have involved 16 separate

appeals. Portions of the history of this litigation are reported in the opinions cited in the footnote.[2]

A flow chart is provided in Appendix A at 1a-4a to assist the Court in relating the various proceedings to each other. Flojo was not a party to all the litigation; therefore, this brief will refer only to the portions of the overall litigation pertinent to Flojo.

In 1982, the Brownings obtained a substantial judgment against Holloway and his alter egos, including Flojo. In the 11 years since the entry of the 1982 Judgment, Holloway has pursued various collateral attacks on the 1982 Judgment. All of these attacks have failed.

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[2] *Flojo Trading Corp. v. Browning*, No. 3-91-256-CV (Tex. App. July 1, 1992) (unpublished); *Holloway v. Starnes*, 840 S.W.2d 14 (Tex. App. 1992, writ denied); *Starnes v. Holloway*, 779 S.W.2d 86 (Tex. App. 1989, writ denied); *Browning v. Ryan*, 756 S.W.2d 379 (Tex. App. 1988) (orig. proceeding), *rev'd*, *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680 (Tex. 1989); *Jaehne v. Starnes*, No. 14,693 (Tex. App. Sept. 23, 1987) (unpublished); *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985); *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App. 1984), *dism'l reinstated*, 690 S.W.2d 321 (Tex. App. 1985, writ ref'd n.r.e.) (*en banc*), *cert. denied*, 475 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed.2d 602 (1986); *Holloway v. Navarro*, No. 91-1541 (5th Cir. Jan. 3, 1992) (unpublished); *Browning v. Navarro*, 923 F.2d 377 (5th Cir. 1991) (*Browning v. Navarro IV*); *Browning v. Navarro*, 887 F.2d 553 (5th Cir. 1989) (*Browning v. Navarro III*), *reh'g denied*, 894 F.2d 99 (5th Cir. 1990); *Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987) (*Browning v. Navarro II*); *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984) (*Browning v. Navarro I*), *rev'g Browning v. Navarro*, 37 B.R. 201 (N.D. Tex. 1983); *Holloway v. Walker*, 784 F.2d 1287 (5th Cir. 1986), *reh'g denied*, 790 F.2d 1170, *cert. denied*, 479 U.S. 984, 107 S.Ct. 571, 93 L.Ed.2d 576 (1986); *Holloway v. Walker*, 800 F.2d 479 (5th Cir. 1986) (Bolivian consul matter); *Holloway v. Walker*, 811 F.2d 263 (5th Cir. 1987) (sanctions).

Flojo's appeal in this case is Holloway's last-ditch effort to use an alter ego, Flojo, to set aside the 1982 Judgment not only as to that alter ego but also as to Holloway. As shown below, this Court should reject this argument and lay this 14-year litigation to rest.

II. History of the Browning-Holloway Litigation.

The Brownings filed the original suit in 1979 (the "1979 Case") against the Holloways, Humble Exploration Company ("Humble," now known as "HECI Exploration Company"), and Sterling Pipeline Company ("Sterling"), alleging fraud and breach of fiduciary duties (App. A at 1a & 4a, see A.1; the 1979 Case is identified by the letter "A" on the flow chart.) The Brownings specifically alleged that Holloway created and operated companies, including Flojo, in disregard of the manner required by law, for the purposes of profiting from lease acquisitions of oil and gas production or related activities belonging to the Brownings. The Brownings specifically requested relief against Holloway, Humble, Sterling and any other entity or organization through which Holloway had conducted the business in the preceding eight years.

Holloway filed bankruptcy proceedings for Humble, Robbie and himself and removed the 1979 Case to the bankruptcy court. (App. A at 1a & 4a, see B.1; Holloway's bankruptcy proceeding is identified on the flow chart by the letter "B.") The bankruptcy court subsequently remanded the case to the trial court but retained jurisdiction for enforcement of any resulting judgment.

Following a lengthy trial, the jury found that Holloway had formed or conducted the affairs of Flojo and other companies in such a manner that such corporate entities were each his alter egos. (Special Issue No. 68.) In addition, the judgment (the "1982 Judgment") held, as a matter of law, that based upon the evidence presented in the 1979 Case, Flojo was Holloway's alter ego. The 1982 Judgment awarded the Brownings damages, a constructive trust or both against Holloway, Robbie and Holloway's alter egos – Humble, Sterling, Holloway Exploration Company and Flojo. (App. A at 1a & 4a, see A.2.) All the parties against whom the judgment issued, including Flojo, appealed. (App. A at 1a & 4a, see A.3.)[3]

Because no supersedeas bond was filed in conjunction with the appeal from the 1982 Judgment, the Brownings filed *Browning v. Navarro* in the federal district court under its bankruptcy jurisdiction to enforce the constructive trust portions of the 1982 Judgment. (App. A at 2a & 4a, see D.1; *Browning v. Navarro* is identified on the flow chart by the letter "D.") In response, Holloway, Robbie, Humble, Sterling and Don Navarro, the newly-appointed trustee of Holloway's bankruptcy estate and Humble's bankruptcy estate, all challenged the 1982 Judgment as void. The federal district court sustained the defendants'

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[3] Even prior to filing the notice of appeal in the 1979 Case, Holloway, Humble and others initiated the first of multiple attacks on the 1982 Judgment by filing *Holloway v. Walker*, a civil rights suit in federal court. (App. A at 1a & 4a, see C.1; *Holloway v. Walker* is identified on the flow chart by the letter "C.") The Brownings eventually obtained a summary judgment against Holloway, which was affirmed on appeal. Flojo was not a party to *Holloway v. Walker*.

arguments and held that the 1982 Judgment was void because the 162nd Judicial District Court, with Judge Dee Brown Walker presiding, had lacked jurisdiction under the bankruptcy court's remand order. *Browning v. Navarro*, 37 B.R. 201, 210 (N.D. Tex. 1983) (App. A at 2a & 4a; see D.2.)

The Brownings moved to dismiss the appeal from the 1982 Judgment due to the appellants' inconsistent claims in the federal court. The court of appeals held that the large record before it showed that the appellants had made no objection to Judge Walker's trying the case on any alleged restrictions contained in a Stipulation and Agreement between the parties in the bankruptcy court. It further found that the appellants had gambled on the verdict in the trial court before Judge Walker and having lost, then pursued their appeal, while at the same time advancing their "leash" theory in the federal courts. *Humble Exploration Co. v. Browning*, 677 S.W.2d 111, 113-14 (Tex. App. 1984). (In oral argument, appellants' counsel told the court of appeals that the bankruptcy court's remand order was like "a 'remand on a leash' whereby the Bankruptcy Court could, at any time, grasp the leash and return the dispute back to that court regardless of its status in the state system." 677 S.W.2d at 113, n.3.) The court of appeals held that the appellants had trifled with the state courts by their conduct and dismissed the appeal. 677 S.W.2d at 114-15. (App. A at 1a & 4a, see A.4.)

Several months later, the Fifth Circuit reversed the federal district court's order in *Browning v. Navarro*. *Browning v. Navarro*, 743 F.2d 1069, 1086 (5th Cir. 1984) (*Browning v. Navarro I*). (App. A at 2a & 4a, see D.3.) The

Texas court of appeals initially granted *ex parte* the appellants' "Motion to Withdraw Judgment Granting Appellees' Motion to Dismiss." Five months later the *en banc* court of appeals held that the appellants' motion had been wrongfully and purposely denominated to obtain a second motion for rehearing in violation of the Texas Rules of Civil Procedure and reinstated the dismissal. *Humble Exploration Co. v. Browning*, 690 S.W.2d 321, 323 (Tex. App. 1985, writ ref'd) *(en banc)*. (App. A at 1a & 4a, see A.5.) The appellants, including Flojo, unsuccessfully sought review of their appeal by the Supreme Court of Texas. (App. A at 1a & 4a, see A.6 & 7.) The appellants, including Flojo, then filed a petition for writ of certiorari with this Court in Cause No. 85-1182. This Court denied certiorari and a subsequent motion for rehearing. *Humble Exploration Co. v. Browning*, 475 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed.2d 602, *reh'g denied*, 475 U.S. 1151, 106 S.Ct. 1807, 90 L.Ed.2d 351 (1986.) (App. A at 1a & 4a, see A.8 & 9.) At no point in those appeals did Flojo argue that it should be treated differently than the other appellants for the purposes of the dismissal.

Meanwhile, following a remand from *Browning v. Navarro I*, the federal district court rejected Holloway's and Navarro's further attacks on the 1982 Judgment and granted the Brownings immediate possession of the constructive trust property.[4] (App. A at 2a & 4a, see D.4.)

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[4] Flojo was not a named party in *Browning v. Navarro*. Aside from its affect on the appeal of the 1979 Case and prompting the *Jaehne v. Starnes* case, that case is not directly pertinent to Flojo. Ultimately the Brownings obtained judgments against Holloway and Robbie in *Browning v. Navarro*. *See Browning v. Navarro*, 923 F.2d 377 (5th Cir. 1991). The *Browning v. Navarro* judgment

Attempting to prevent compliance, Holloway (without Navarro's approval), Flojo and other cohorts filed *Jaehne v. Starnes*, another collateral attack on the 1982 Judgment, in the district courts of Lee County, Texas. (App. A at 2a & 4a, see H.1; *Jaehne v. Starnes* is identified on the flow chart by the letter "H"; App. D at 17a.) Holloway obtained an *ex parte* temporary restraining order and multiple extensions prohibiting compliance with the federal district court's orders in *Browning v. Navarro*. On August 28, 1985 the local Lee County judge, who had issued the serial temporary restraining orders for Holloway, signed an order which held the 1982 Judgment void for a litany of alleged reasons. (App. A at 2a & 4a, see H.2.)

On the same day the Texas Supreme Court stayed the order in an original mandamus proceeding, *Browning v. Placke* (which is identified on the flow chart by the letter "I"; App. A at 3a & 4a, I.1). Flojo, Holloway and other plaintiffs in *Jaehne v. Starnes* filed six briefs in support of Judge Placke's order. Flojo's key argument was that the 1982 Judgment was void as to it because the judgment granted an award against Flojo even though Flojo had not been named as a party or served in the 1979 Case. Flojo further argued that because the 1982 Judgment was void as to it, it was also void as to Holloway. The Texas Supreme Court rejected all their arguments, held that the record did not show that the 1982 Judgment was void,

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enjoins Holloway, Robbie and those acting in concert with them from initiating or pursuing any future proceeding of any kind in the courts of the United States alleging the invalidity of the 1982 Judgment.

and issued a conditional writ of mandamus. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). (App. A at 3a & 4a, see I.2.)

Shortly following this Court's denial of the motion for rehearing in the direct appeal from the 1979 Case, and a number of decisions adverse to Holloway in *Browning v. Navarro* and *Holloway v. Walker*, Holloway incorporated his prior allegations and added new ones in three new, virtually identical attacks on the 1982 Judgment. The first attack was in *Browning v. Navarro* (App. A at 2a & 4a, see D.5), the second was in the bankruptcy court (App. A at 1a & 4a, see B.3), and the third, virtually identical attack, was the filing of this case. (App. A at 3a & 4a, see J.1; *Holloway v. Starnes* is identified on the flow chart by the letter "J.") Holloway filed this suit on behalf of Flojo, Humble, Sterling, Robbie and himself.

In this case, Holloway filed twelve motions for partial summary judgment. In his first motion for summary judgment Holloway alleged that Judge Walker had been disqualified by the Texas Constitution by virtue of (1) his interest; (2) his acts as counsel in the case; and (3) his bias, amounting to denial of due process under the Texas constitution. In his Amended Third Motion for Summary Judgment, Holloway contended that the courts should set aside the 1982 Judgment as void because it purported to impose joint and several liability on Flojo and him, even though Flojo had not been named as a defendant in the 1979 Case, had not been served with process, and had not appeared. (App. B at 5a.) In his Sixth Motion for Partial Summary Judgment, Holloway asserted that Judge Walker had acted as counsel for the Brownings and therefore had been disqualified. Flojo did not join in those

motions, did not ever adopt any of Holloway's twelve motions for summary judgment, and did not file any motion for summary judgment itself. (App. B at 6a; App. C at 13a-16a.)

The Brownings moved for summary judgment. With respect to the claims of Flojo, the Brownings contended that they were entitled to summary judgment on the grounds of: (1) Flojo's unsuccessful appeal from the 1982 Judgment; (2) Flojo's preclusion under *res judicata* by the decision in *Browning v. Placke*; and (3) Flojo's being barred from attacking the 1982 Judgment because its Texas corporate charter had been forfeited for non-payment of franchise taxes. Flojo filed no response to the Brownings' original or amended motions for summary judgment. The 162nd Judicial District Court granted the Brownings' motion for summary judgment without specifying the specific reasons for its judgment. (App. A at 3a & 4a, see J.5.)

In its appeal to the Texas court of appeals, Flojo only assigned as error the district court's granting the Brownings' motion for summary judgment "based on *res judicata* because Flojo was not a party either to the original Browning judgment sought to be vacated herein or to any subsequent case which could possibly bar this bill of review." Flojo's other assignments of error contended that the district court erred by denying Holloway's Amended Third Motion for Summary Judgment, First Motion for Summary Judgment, and Sixth Motion for Partial Summary Judgment.

The Texas court of appeals affirmed the summary judgment against Flojo because the summary judgment

may have been granted on a ground that was not challenged by Flojo in the appeal. *Holloway v. Starnes*, 840 S.W.2d 14, 23 (Tex. App. 1992, writ denied). (App. A at 3a & 4a, see J.6.) In its motion for rehearing to the court of appeals, Flojo adopted the motions for rehearing of Holloway and Robbie, but asserted no points of error of its own. Neither Holloway nor Robbie assigned error to the court of appeals' ruling on Flojo in their motions for rehearing. In its application for writ of error to the Supreme Court of Texas, Flojo did not assign a point of error, or otherwise address the grounds for the court of appeals' affirmance of the summary judgment against it.

In its application for writ of error to the Texas Supreme Court, Flojo argued for the first time that the trial court's judgment against in this case could not stand because the Brownings had not obtained service on it. The Supreme Court of Texas denied writ of error and subsequently denied Flojo's motion for rehearing. (App. A at 3a & 4a, see J.7 & 8.)

Concurrent with these developments in the case below, the Lee County district court granted the Brownings a summary judgment against Flojo in *Jaehne v. Starnes* on April 3, 1991. (App. A at 3a & 4a, see H.7 & 8, App. E at 26a.) Another Texas court of appeals affirmed that summary judgment on July 1, 1992. (App. A at 3a and 4a, see H.10, App. F at 30a, App. G at 32a.) Flojo did not appeal from that appellate court's judgment.

REASONS FOR DENYING THE WRIT

I. Flojo Did Not Preserve in the Trial Court The Issues it Seeks to Present Here.

The issues that Flojo seeks to present here were alleged in the plaintiffs' petition which Holloway filed on Flojo's behalf (which Flojo now attempts to disclaim) and were urged by Holloway in three of his 12 motions for summary judgment. Flojo, however, did not join or adopt Holloway's motions for summary judgment, nor move for summary judgment on these or any other issues. (App. B at 6a, App. C at 13a-16a.) Under Texas case law, an appellate court cannot grant a summary judgment for a party who has not moved for summary judgment. *Teer v. Duddlesten*, 664 S.W.2d 702, 703 (Tex. 1984); *San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 210 (Tex. 1990). While addressing the Holloways' assignments of error concerning the Third Motion for Summary Judgment, the court of appeals specifically held that Flojo could not rely on that motion for reversal on appeal because it did not adopt the motion. 840 S.W.2d at 24.

Rule 14.1(h) of this Court's rules provides:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal question[s] sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter

> appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) ***as will show that the federal question was timely and properly raised so as to give this Court jurisdiction*** to review the judgment on a writ of certiorari. . . .

(Emphasis added.) Flojo failed to timely and properly raise in the court of first instance the questions it seeks to present in the court of first instance so as to give this Court jurisdiction.

II. There Are Multiple Adequate, Independent, Non-Federal Grounds to Support the Judgment.

It is a settled rule of this Court that where the judgment of a state court rests on two grounds, one of which is non-federal in character, this Court's jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Board of Supervisors v. Allman*, 423 U.S. at 940, 96 S.Ct. at 300, 46 L.Ed2d at 272; *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935).

A. The Trial Court Had Three Independent Non-Federal Grounds for Granting Summary Judgment.

The various grounds for the Brownings' motion for summary judgment against Flojo included: (1) Flojo's unsuccessful appeal of the 1982 judgment; (2) Flojo's preclusion under *res judicata* by *Browning v. Placke*; and (3) Flojo's being barred from attacking the 1982 Judgment

because its charter had been forfeited for non-payment of franchise taxes.

Flojo was an appellant in the direct appeal from the 1982 Judgment. The court of appeals dismissed that appeal after finding that the appellants had abused the Texas judicial system. *Humble Exploration Co. v. Browning*, 677 S.W.2d at 114. Under Texas law, a bill of review is not an alternative remedy to a direct appeal. A direct appeal would have provided adequate relief to Flojo. Therefore, it had to allege and prove that it was unable to obtain relief in a direct appeal because (1) it was prevented from doing so by the fraud, accident or wrongful act of the opposite party, *French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967); and (2) its inability to have the case resolved on appeal was unmixed by any fault or negligence of its own. *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 246 (Tex. 1974). Flojo now contends that the court of appeals erred in dismissing its appeal in the 1972 Case because it had not been a party to the Holloway's abuse of the judicial system. Flojo should have made this argument in the original appeal. Its failure to do so was its own fault.

Flojo, along with Holloway and other cohorts, also collaterally attacked the 1982 Judgment as void in *Jaehne v. Starnes*, for these same reasons it asserts here. (App. D at 19a-23a.) In *Jaehne v. Starnes*, Judge Placke issued an order holding the 1982 Judgment void for numerous reasons, including the fact that the 1982 Judgment was awarded against Flojo which had not been a named party to the 1979 Case. The Brownings attacked Judge Placke's order in *Browning v. Placke*, a mandamus proceeding

before the Texas Supreme Court. Flojo filed two responsive briefs with the Texas Supreme Court in which it argued that the 1982 Judgment was void because it was imposed on Flojo, which was not a party to the 1979 Case. The Texas Supreme Court issued its mandamus to vacate Judge Placke's order because the record, including the Flojo claim, did not show that the 1982 Judgment was void. *Browning v. Placke*, 698 S.W.2d at 363. Thus, Texas law of *res judicata* would bar Flojo's relitigating its contention that the 1982 Judgment was void.

The summary judgment record also included a certificate from the Texas Secretary of State showing that Flojo's tax identification number had been forfeited on September 19, 1982 and its charter had been forfeited on February 20, 1982, over a year prior to the Brownings' obtaining from the federal courts their first enforcement order for the 1982 Judgment. Section 171.252 of the Texas Tax Code prohibits a corporation which has its corporate privileges forfeited from suing or defending in a court of Texas.[5]

This prohibition is a proper and broad exercise of the Legislature's authority. *Federal Crude Oil Co. v. Yount-Lee Oil Co.*, 122 Tex. 21, 52 S.W.2d 56, 59-60 (1932). Therefore, Flojo was prohibited from attacking the 1982 Judgment in the courts of Texas while its charter was forfeited.

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[5] If the corporate privileges of a corporation are forfeited under this subchapter:

(1) the corporation shall be denied the right to sue or defend in a court of this state; . . . .

Tex. Tax Code Ann. § 171.252 (1992).

B. The Court of Appeals Had an Additional Independent State Ground for Affirming the Judgment Against Flojo.

Texas trial courts are not required to identify the specific grounds upon which they might grant a summary judgment. An appellant attacking a summary judgment in Texas must therefore attack each of the several grounds asserted in a motion for summary judgment on which the trial court could have based a summary judgment. *Malooly Brothers, Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). An appellant may do that by either a general point of error attacking the grant of the motion for summary judgment or separate points of error attacking each of the several grounds asserted in the motion for summary judgment. *Id.* If there is not a general assignment that the trial court erred in granting summary judgment and there is a ground not specifically challenged by the appellant, the summary judgment must stand. *Id.* The court of appeals affirmed the judgment against Flojo under this rule of Texas appellate procedure because Flojo failed to properly urge on appeal that the trial court had erred in granting summary judgment on the ground that the forfeiture of its corporate charter barred its attack on the 1982 Judgment. *Holloway v. Starnes*, 840 S.W.2d at 23.

C. The Texas Supreme Court's Denial of Writ of Error Is Supported by an Independent State Ground.

In Texas when the judgment of a court of appeals rests upon more than one ruling by it, the party

aggrieved by the judgment must assign error to each ruling or risk having the judgment affirmed on the ruling to which no error has been assigned. In such situations, the petitioner waives his right to complain of the ruling to which no error was assigned. *City of Deer Park v. State*, 154 Tex. 174, 275 S.W.2d 77, 84 (1955). In this case Flojo made no assignment of error in its petition to the Texas Supreme Court regarding the basis upon which the court of appeals affirmed the judgment against it. It therefore waived any complaint about that ruling and the judgment would have to be affirmed on that basis.

At each level of the state courts in this case, there have been separate state grounds, independent of the federal issues sought to be presented by Flojo here, which support the Brownings' judgment against it. Flojo has failed to establish the jurisdiction necessary for this Court's review of the decision below by certiorari.

III. Reversal of This Suit as to Flojo Would Not Provide Any Practical Benefits to Flojo.

Flojo attempts to evade the judgments of the Texas courts below by now contending that those courts had no personal jurisdiction over it. Flojo raised this argument for the first time in the Texas Supreme Court. Holloway filed this suit individually and on behalf of Flojo, Robbie, Humble and Sterling. Holloway, who is an attorney admitted to practice before the courts of Texas, as well as the federal district courts in the Northern District of Texas and the Fifth Circuit, identified himself as "attorney *pro se*." Flojo now suggests that Holloway had no

authority to represent it. It apparently contends that Holloway had to have service issued on it as well as the defendant Brownings in order for the Texas courts to obtain personal jurisdiction over it. At the same time that Holloway filed this suit on behalf of Flojo in this case, he was a co-party and acting as attorney for Flojo in *Jaehne v. Starnes*, where Holloway had asserted many of the same contentions on behalf of Flojo. There is nothing in the appellate record to indicate that Holloway did not have authority to act on behalf of Flojo in this case.

Moreover, before the appellate courts below and this Court, Flojo has sought not merely to avoid application of the Brownings' judgment against it, but rather an affirmative judgment for both itself and the Holloways.[6] In seeking relief for itself and the Holloways, it has to rely on both the pleadings and motions for summary judgment filed by Holloway. A party who seeks affirmative relief from a court is estopped under Texas law to claim that

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[6] Even if Flojo had been permitted to attack the 1982 Judgment in this appeal on the grounds that the trial court had no personal jurisdiction over Flojo in the 1979 Case, this would not benefit Holloway. The 1982 Judgment was joint and several. In such cases, a reviewing court may affirm a judgment against one defendant charged jointly and severally as a tortfeasor and reverse the judgment as to another defendant so charged. *Missouri, K. & T. Ry. Co. of Texas v. Enos*, 92 Tex. 577, 50 S.W. 928 (1899); *S.H. Kress & Co. v. Selph*, 250 S.W.2d 883, 896 (Tex. Civ. App. 1952, writ ref'd n.r.e.). In the 1982 Judgment, Flojo's liability was derivative of Holloway's liability. As the court of appeals held, although a reversal as to Holloway would require a reversal as to Flojo, the reverse was not true. *Holloway v. Starnes*, 840 S.W.2d at 24. The inclusion of Flojo in the 1982 Judgment, even if erroneous, would not require that the 1982 Judgment be set aside against the Holloways.

that court was or is without jurisdiction. *Hilburn v. Jennings*, 698 S.W.2d 99, 100 (Tex. 1985); *Spence v. State Nat'l Bank*, 5 S.W.2d 754, 756 (Tex. Comm'n App. 1928, judgm't adopted).

Furthermore, Flojo's various positions are internally inconsistent. In order to avoid the judgment in favor of the Brownings, it claims that Holloway had no authority to represent it in filing this suit. Simultaneously, it asks this Court to grant it affirmative relief holding the 1982 Judgment void based upon Holloway's pleadings and motions for summary judgment. Flojo cannot have it both ways.

Even if Holloway had no authority to bring this suit on behalf of Flojo, that circumstance would not assist Flojo in obtaining affirmative relief at this time. The most Flojo would be entitled to would be a holding that it is not a party to this suit and setting aside the judgment as to it.

The statute of limitations for a bill of review in Texas is four years. *Levy v. Roper*, 256 S.W. 251, 253-54 (Tex. 1923); *Steward v. Steward*, 734 S.W.2d 432, 434 (Tex. App. 1987, no writ). The 1982 Judgment, as amended, attacked in this suit was signed on November 11, 1982. Flojo knew that the trial court had granted the judgment against it in 1982 because it appealed that judgment. Therefore, Flojo had to file any bill of review prior to November 11, 1986. It cannot now claim both that Holloway had no authority to file this suit on its behalf, and at the same time use Holloway's filing to meet the statute of limitations. Thus, even if the judgment against Flojo were reversed in this case, Flojo would gain nothing. Any new bill of review

for Flojo is now time-barred for more than six years under Texas law.

In addition, *Jaehne v. Starnes*, under the doctrine of *res judicata* now bars any new attack by Flojo on the 1982 Judgment. In its petition for certiorari, Flojo stated that it preferred litigating its claims against the Brownings in *Jaehne v. Starnes* instead of this case. In that suit, Flojo and the Jaehnes collaterally attacked the 1982 Judgment on the grounds that they were not personally subject to the jurisdiction of the trial court in the 1979 Case. (App. D at 19a-23a.) The Lee County court granted the Brownings a summary judgment against Flojo and the Jaehnes in April, 1991. That judgment provides in part:

> IT IS FURTHER ORDERED, ADJUDGED and DECREED that Bennie C. Jaehne, Herman Jaehne, and *Flojo* Trading Corporation ***take nothing on any of their claims attacking the validity or enforceability of the Browning v. Holloway Judgment*** and all other claims against the Browning Interests, their agents, employees, attorneys or servants for conduct involved in the litigation of that cause of action, including any past or current enforcement efforts instituted by the Browning Interest (sic) in aid of the *Browning v. Holloway* Judgment. All such claims are hereby dismissed with prejudice.

(App. E at 28a, emphasis added.)

The Austin Court of Appeals affirmed that judgment on July 1, 1992. (App. F and G at 30a & 32a.) That opinion

shows that the Brownings had six grounds for summary judgment, only one of which was *res judicata* as a result of this case. (App. G at 36a-37a.) The Austin Court of Appeals affirmed the *Jaehne v. Starnes* judgment because the appellants (just like Flojo here) failed to make either a general assignment of error or attack all the possible grounds for the trial court's judgment. Therefore, the *Jaehne v. Starnes* judgment is now *res judicata* to any future attacks Flojo might make on the 1982 Judgment as void for any reason. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 626, 630-31 (Tex. 1992).

IV. The Decisions of the Courts Here Are In No Way Contrary to *Peralta*.

Peralta v. Heights Medical Center, Inc. involved a defendant who had a default judgment taken against him in the absence of any valid service of process or notice of judgment. 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988). The Texas courts denied a bill of review in that case because Peralta could not show that he had a meritorious defense to the original suit. This Court held that the due process clause of the Fourteenth Amendment required the granting of the bill of review so that the defendant would be in the same position he occupied had he received due process in the first place. 485 U.S. at 900, 108 S.Ct. at 900.

For the various reasons explained previously, including Flojo's failure to ever move for a summary judgment on this basis, the courts below never reached Flojo's *Peralta* argument. Therefore, they have made no rulings that are contrary to *Peralta*. Moreover, the situation in the

1979 Case was not the same as *Peralta*. The Brownings had alleged specifically that Holloway set up and acted through corporations which were his alter egos. The jury found as a matter of fact and the trial court held as a matter of law under the evidence presented in the original case, that Flojo was one of the alter egos of Holloway. It is on that basis that Flojo was included in the 1982 Judgment.

Under Texas law, Flojo was not a separate legal entity from Holloway. *Matthews Constr. Co., Inc. v. Rosen*, 796 S.W.2d 692, 694 (Tex. 1990). As such, it had been served, and participated in the trial through Holloway. As Holloway's alter ego, Flojo was liable for Holloway's actions, and its corporate property was subject to execution to satisfy a judgment against him. *Matthews Constr. Co., Inc. v. Rosen*, 796 S.W.2d at 693; *American Petroleum Exchange, Inc. v. Lord*, 399 S.W.2d 213 (Tex. Civ. App. 1966, writ ref'd n.r.e.). There was no violation of Flojo's right to due process.

CONCLUSION

Throughout this litigation, Flojo has acted as a Trojan horse for Holloway. This tactic is nowhere more evident than in its appeal, where Flojo eschewed assignments of error relevant to the decisions adverse to it in favor of assignments of error designed to support the Holloways. Even in this Court, Flojo ignores the grounds upon which the Texas courts ruled against it and asserts claims raised in the trial court not by it but by the Holloways. Flojo

presents no federal issues that it raised and preserved in the state courts for this Court to review.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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